In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 247

STATE OF TEXAS EX REL. J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, PETITIONER

v.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS, AND BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

By the terms of the National Bank Act and the Federal Deposit Insurance Act, national banks (12 U.S.C. 90) and all banks insured by the Federal Deposit Insurance Corporation (12 U.S.C. 265) may be designated by the Secretary of Treasury as depositaries of public money and may be employed as financial agents of the government. Respondents are two national banking associations, insured by the FDIC, which are depositaries of public money and which have been designated by the Secretary of

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Treasury as financial agents of the government; as such, they have also been authorized and directed by the Secretary to provide and maintain limited banking facilities at the military installations at Lackland Air Force Base. Pursuant to the Secretary's direction, respondents, from 1943 to 1946 and from 1949 to the present, have (1) provided paying and receiving facilities for officers, enlisted personnel, and civilian employees of the Air Force and for custodians of non-appropriated funds of the Air Force; (2) furnished cash to disbursing officers of the Air Force; (3) accepted deposits for credit to the account of the Treasurer of the United States; (4) sold and redeemed United States savings bonds; and (5) sold cashier's checks and bank money orders.

Petitioner, by this action, seeks to prohibit respondents from providing these services, on the ground that the banks are forbidden by the Texas Constitution and statutes[1] from carrying on these activities at the Base. The court of appeals, affirming

[1] Texas Constitution, Art. 16, § 16:

"The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

"No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter. * * *"

Vernon's Annotated Texas Statutes, Art. 342-903:

"No state, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house. * * *"

the judgment of the district court, has held (Judge Hutcheson dissenting) that, under 12 U.S.C. 90 and 12 U.S.C. 265 (Pet. App. 12–13), the Secretary clearly had authority to designate respondents as government financial agents and, as government agents, to require that they maintain limited banking facilities at military installations. Since this is an authorized and reasonable exercise of federal power, the court held that the Texas law prohibiting all types of "branch banking" (footnote 1, *supra*) must give way. The United States submits that this decision is correct and does not call for review by this Court, and accordingly that the petition should be denied.

Commencing in 1942 with the wartime expansion of the nation's military forces and continuing to the present day, as part of the defense program, the United States has called upon both national and state banks to act as financial agents of the government and to provide needed, albeit limited, banking services at military installations. As of December 15, 1959, 266 of these facilities were being maintained at 54 Army, 109 Air Force, 82 Navy, 12 Veterans Administration, and 9 miscellaneous federal installations in 45 states, by 189 national and 61 state banks. The facilities provided by these banks, at the direction and under the supervision of the Secretary of Treasury, have proved to be an important adjunct of the military program, providing as they do necessary banking services for the United States, the military personnel, and civilian employees of the government at military installations. The facilities are maintained only as the

needs of the military require and only where established commercial banking facilities are wholly unavailable or not conveniently accessible. Though many of the 45 states in which these facilities are maintained have, with variations, restrictions and prohibitions on branch banking, the State of Texas is the only state, in 19 years, to suggest that state laws may serve to restrict or to prohibit the operation of such facilities. The present case is thus a case of first impression and the decision below is not in conflict with that of any other circuit. At this time the question presented cannot be deemed likely to recur, and, though the continued maintenance and operation of the facilities is of importance to the United States, the question is not, in our view, of such importance as to deserve this Court's consideration in the present case.

In addition, we believe that the decision below is consistent with the rulings of this Court from *McCulloch* v. *Maryland,* 4 Wheat. 316, to *Franklin National Bank* v. *New York,* 347 U.S. 373—upholding valid federal regulation of federally-affiliated banks as against contrary state legislation. The court of appeals was correct in rejecting petitioner's attempt to equate the limited banking facilities operated by respondents with a commercial branch banking operation, and thus to bring into operation 12 U.S.C. 36(c) (Pet. App. 11) which permits national banks to establish and operate branch banks only where state law permits. There are similarities between the facilities respondents maintain and a branch bank but there are

also fundamental differences.[2] Only by a strained interpretation can 12 U.S.C. 36, dealing with commercial branch banks, be read as limiting the "reasonable duties" a national bank may perform, under 12 U.S.C. 90 and 290, when acting as a financial agent of the government and as a depositary of public money.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] A commercial branch bank is ordinarily a self-sustaining economic enterprise; the limited facilities provided by respondents, pursuant to 12 U.S.C. 90 and 12 U.S.C. 265, on the other hand, are, in reality, subsidized by the government which provides, without charge, banking quarters, military guards, janitorial services, and utilities. Moreover, for operating losses sustained, the banks are, in effect, reimbursed by the Treasury.

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